SUPREME COURT, U. S.
75-352
FILED
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IN THE

Supreme Court of the United States

No. ....., ... Term, 1975

DOMINIC N. DiSILVIO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Dominic N. DiSilvio, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on July 17, 1975, and the Order denying the Petition for Rehearing dated August 6, 1975.

OPINIONS BELOW

An opinion was rendered by the United States Court of Appeals for the Third Circuit in this matter. Said opinion, affirming the district court's order denying Petitioner—defendant's motion to dismiss the indictment, is not yet reported but is set forth herein at appendix B. The court's order denying the petition for rehearing is not yet reported but is set forth herein at appendix C.

The district court's memorandum and order denying Petitioner-defendant's motion to dismiss the indictment is set forth herein at appendix A.

Question Presented.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was filed on July 17, 1975. A timely petition for rehearing was denied on August 6, 1975. Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within thirty (30) days after the entry of the court of appeals' final order.

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1254 (1).

QUESTION PRESENTED

Whether the indictment at criminal number 74-139 violates Petitioner's constitutional right against double jeopardy since the evidence presented by the government at his prior trial of the indictment at criminal number 73-201 was insufficient to sustain a conviction on identical charges?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

FEDERAL STATUTES INVOLVED

Title 18, United States Code, Section 659 provides as follows:

§ 659. INTERSTATE OR FOREIGN SHIPMENTS BY CARRIER; STATE PROSECUTIONS

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fradulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof. As amended Oct. 14, 1966, Pub.L. 89–654, § 1(a)–(d), 80 Stat. 904.

Rule 29 of the Federal Rules of Criminal Procedure provides as follows:

MOTION FOR JUDGMENT OF ACQUITTAL

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on

either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.
As amended Feb. 28, 1966, eff. July 1, 1966.

STATEMENT OF THE CASE

History

Your Petitioner, Dominic N. DiSilvio, was indicted at criminal number 73-201 in the Western District of Pennsylvania. The federal grand jury charged that DiSilvio received certain chattels which he knew had been stolen from an interstate shipment of freight in violation of 18 U.S.C. §659.

A jury trial was convened before the Honorable Barron P. McCune, District Judge, on April 10, 1974, in the United States District Court for the Western District of Pennsylvania. On April 15, 1974, following the conclusion of the government's case in chief, Judge McCune denied Petitioner's motion for judgment of acquittal. On April 16, 1974, Judge McCune granted Petitioner's motion to dismiss the indictment.

A notice of appeal from the order of the district court granting Petitioner's motion to dismiss the indictment was filed by the government. A notice of appeal from the order of the district court denying Petitioner's motion for judgment of acquittal was filed by Petitioner.

By judgment order dated September 23, 1974, the United States Court of Appeals for the Third Circuit affirmed Judge McCune's order dismissing the indictment. By judgment order dated September 26, 1974, the Third Circuit found that Judge McCune's denial of Petitioner's motion for judgment of acquittal was not appealable and therefore dismissed Petitioner's appeal on that issue.

On April 19, 1974, Petitioner was indicted at criminal number 74-139 in the Western District of Pennsyl-

vania and charged with receiving certain chattels which he allegedly knew had been stolen from an interstate shipment of freight in violation of 18 U.S.C. §659, the same charge recited at criminal number 73-201.

On November 22, 1974, Petitioner filed a motion to dismiss the indictment at criminal number 74-139. Said motion alleged that, as a result of the dismissal of the indictment at criminal number 73-201, any further prosecution of Petitioner under the indictment at criminal number 74-139 will violate Petitioner's constitutional right not to be placed twice in jeopardy.

On January 7, 1975, Judge McCune issued a memorandum and order denying Petitioner's motion to dismiss the indictment. Petitioner subsequently filed a notice of appeal from said order in the United States Court of Appeals for the Third Circuit. By opinion dated July 17, 1975, the court affirmed said order. A Petition for Rehearing was denied on August 6, 1975. The within Petition for Writ of Certiorari follows.

Facts

The following testimony was presented by the government at the trial on criminal number 73-201, which trial terminated (by dismissal of the indictment) after the conclusion of both the government and defense testimony:

According to a General Electric Company shipment record, one hundred (100) radios/cartons supposedly were shipped from General Electric to the Port Authority of Allegheny County, Pennsylvania, in August, 1972. The shipment originated in Lynchburg, Virginia. In Roanoke, Virginia, it was unloaded, transferred to a different unit and combined with other freight. On

August 29, 1972, at the Port Authority receiving area in Pittsburgh, Pennsylvania, it was discovered that the shipment was twenty (20) cartons short.

A General Electric Company official testified that he personally had no way of knowing whether the full shipment had been received by the Port Authority, nor did he have personal knowledge of what happened to the twenty (20) missing cartons.

In May, 1973, nine months after they were reported missing, the cartons were recovered in Joseph Chepes' garage in Masontown, Pennsylvania. Mr. Chepes had received these cartons/radios from the Petitioner in Pittsburgh, Pennsylvania, during that same month (i.e. May, 1973).

REASONS FOR GRANTING A WRIT OF CERTIORARI

The Indictment at Criminal Number 74-139 Violates Petitioner's Constitutional Right Against Double Jeopardy Since the Evidence Presented by the Government at His Prior Trial of the Indictment at Criminal Number 73-201 Was Insufficient to Sustain a Conviction on Identical Charges.

Petitioner DiSilvio contends that the indictment at criminal number 74-139 violates his constitutional right against double jeopardy because the evidence presented by the government at his prior trial of criminal number 73-201 was insufficient to sustain a conviction. As noted above, the charges recited at 74-139 are identical to those recited at 73-201. Therefore, since the evidence already presented at the first trial failed to prove that Petitioner violated 18 U.S.C. §659 as charged in the indictment at 73-201, a retrial of the same charge would be contrary to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.[1]

Petitioner urges that this contention was misconstrued and misinterpreted by the court of appeals. Instead of reviewing Petitioner's argument, the court determined that "[o]ur focus for purposes of this appeal

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1. As this Court has held, the prohibition of the Double Jeopardy Clause in the United States Constitution is "not against being twice punished but being twice put in jeopardy", *United States v. Ball,* 163 U.S. 662, 669, 16 S.Ct. 1192, 1194 (1896); and jeopardy attaches when the jury is empaneled. *Downum v. United States,* 372 U.S. 374, 83 S.Ct. 1033 (1963). Here, jeopardy attached when the jury was empaneled on April 10, 1974, at criminal number 73-201.

is directed solely at the district court's dismissal of the indictment" (opinion of the court dated July 17, 1975, hereinafter referred to as "opinion", appendix 24). The Court then decided that the granting of a defendant's motion to dismiss a defective indictment does not bar retrial of that defendant. With this decision, Petitioner concurs. However, the within matter involves a different issue. Here, Petitioner did not challenge his re-indictment on the basis that the mere dismissal of the first indictment prevented a second trial, but he asserted that the Fifth Amendment protects him from a second trial when the evidence at the first trial on identical charges was insufficient to sustain a conviction. Regardless of the fact that the first indictment was eventually dismissed because of a defect in its language, this did not occur until after the government had completed its case and Petitioner had requested a judgment of acquittal which the trial court denied. *Accordingly, DiSilvio sought what is essentially appellate review of this lower court denial of his motion for judgment of acquittal.* Failure by the court of appeals to undertake such a review, it is suggested, frustrates the policies underlying the Double Jeopardy Clause. See: *United States v. Green,* 355 U.S. 184, 78 S.Ct. 221 (1957).

Petitioner's argument is simple, yet logical. It is beyond doubt that an acquittal bars a retrial. *United States v. Ball, supra.* Since an acquittal is required when the evidence is insufficient to sustain a conviction, insufficiency of the evidence also would bar a retrial. *Sapir v. United States,* 348 U.S. 373, 75 S.Ct. 422 (1955); see also: *Commonwealth v. Dale,* Pa. Super., 335 A. 2d 454 (1975). Therefore, if this Court finds that the evidence presented at the trial below was insufficient to sustain a conviction for a violation of 18 U.S.C. §659

(even pursuant to a properly worded indictment), a re-trial of Petitioner by virtue of a new indictment should be barred.

While it is true that the court of appeals wrote that ". . . the evidence introduced at trial on the original indictment was sufficient to make out a prima facie case under the statute" (opinion, 23), Petitioner maintains that this statement does not resolve the issue raised by him. First, as mentioned above, the lower court's "focus" was not on this issue. Second, the proper question as in all appeals in criminal cases, is whether the evidence was sufficient under the *indictment* and not whether the evidence was sufficient under the *statute* (even though Petitioner firmly believes that the evidence in the instant case is wholly insufficient under either criteria). Third, the correct standard of review was not applied. The standard is not whether a "prima facie" case has been established, but whether the ". . . evidence is insufficient to sustain a conviction" of the offense charged in the indictment. Federal Rules of Criminal Procedure, Rule 29.

Applying the Rule 29 standard to the case at 73-201 (the first trial), Petitioner argues that the evidence presented through the course of the government's case was insufficient to sustain a conviction of the offense charged. In order that one be convicted of violating the provision of 18 U.S.C. §659, which is recited in the indictment, two (2) elements must be proven. First, embezzled or stolen goods or chattels must be shown to have been embezzled or stolen from one or more of the following:

> ". . . any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or

> storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility . . .". 18 U.S.C. §659.

In the case at bar, no evidence was presented as to how or from where the goods were embezzled or stolen. Moreover, the record is devoid of any evidence which proves that the goods were *in fact* embezzled or stolen. Charles W. White, the Regional Service Manager for General Electric Company, testified that he had no personal knowledge of what happened to the twenty (20) missing radio units, and that he had no way of knowing whether the full shipment of radios was ever received. Cecil Webster, the Supervisor of Security for Associates Transport and the individual who investigated the loss of certain items in the shipment, testified that he had no personal knowledge of the facts alleged in the shipping records. Even Thomas Lamark, the driver for Associated Transport who discovered at the Port Authority receiving area that his shipment was twenty (20) cartons short, could not explain where or how or whether in fact the goods were embezzled or stolen. Under these circumstances, the holding of *United States v. Manuszak,* 234 F. 2d 421 (3d Cir. 1956), is directly applicable. There, the Third Circuit held:

> "Under this statute (18 U.S.C. §659), it is not a federal crime to steal goods from an interstate shipment of freight *unless the goods are taken from one of the specifically enumerated places or facilities.* Other thefts, although of goods which are

part of an interstate shipment, are not federal crimes." 234 F. 2d at 423 (Emphasis supplied).[2]

Here, no evidence has been presented to show that the goods in question were taken from one of the enumerated places or facilities listed in the statute. Therefore, in view of the language of 18 U.S.C. §659 and the *Manuszak* decision, there is no evidence of a federal crime.

The second element necessary to prove a violation of the relevant provision of 18 U.S.C. §659 is the requirement that the person who receives or possesses "any such goods or chattels" must do so ". . . knowing the same to have been embazzled or stolen . . ." Here, three (3) government witnesses, Joseph Allen Chepes, Joseph Chepes and Bernice Chepes, either possessed the goods in question or knew of their existence in May, 1973. Each of these witnesses testified that they had no reason to believe that the radios were stolen. Furthermore, considering the record as developed at trial, no inference can arise that Petitioner knew that the radios were stolen because such an inference is only permissable when the goods involved are "recently" stolen. *United States v. Allegrucci,* 258 F. 2d 70, 73 (3d Cir.

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2. In *Manusak,* the Third Circuit also held that an indictment charging theft of goods from an interstate shipment under 18 U.S.C. §659 is defective unless the specific place or facility from where the goods are stolen is set forth in the indictment. However, the Second, Fourth and Ninth Circuits (cf. *Dunson v. United States,* 404 F.2d 447, 448-449 (9th Cir. 1968)) have held contra. Therefore, if the instant case had been tried in one of those three circuits, the original indictment would not have been dismissed. The issue there would be, as it is here, whether the evidence presented by the government is sufficient to sustain a conviction on the charges alleged in the indictment.

1958). As explained above, there is no evidence here that the goods were stolen. Regardless, it cannot be said that the goods were "recently" stolen since they were reported as missing in August, 1972, and not recovered until May, 1973. Accordingly, the government also failed to prove the second element of the statutory provision.

In light of the above discussion and the Fifth Amendment principle of due process which requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . ." *In Re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970), Petitioner submits that the government failed to present sufficient evidence to sustain a conviction of 18 U.S.C. §659.

In denying Petitioner's motion to dismiss the indictment, the trial court relied on *United States v. Ball, supra.* and *United States v. Beard,* 414 F. 2d 1014 (3d Cir. 1969). However, these cases are distinguishable from the instant matter. In both, the court held that reversal of a conviction due to a fatally defective indictment did not bar the government from reindicting and retrying a defendant. Here, the issue is different. Here, Petitioner simply contends that since the evidence offered at the first trial failed to prove a violation of 18 U.S.C. §659, a retrial on the same charge would be contrary to the Double Jeopardy Clause. Thus, the lower court's reliance was misplaced, and its denial of the motion to dismiss the indictment was error.

CONCLUSION

In the instant matter, Petitioner believes that he raises a very important question for this Honorable Court's consideration. For this reason and others discussed above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS A. LIVINGSTON, ESQ.
Attorney for Petitioner

DENNIS J. CLARK, ESQ.

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
DOMINIC N. DISILVIO
Criminal No. 74-139

Memorandum and Order

BARRON P. MCCUNE, District Judge
January 7th, 1975.

The defendant has moved to dismiss the within indictment on the ground that the defendant has twice been placed in jeopardy. This is the second indictment of defendant charging a violation of 18 U.S.C. 659.

The first indictment was returned at No. 73-201, charging a violation of 18 U.S.C. 659, the receipt of stolen chattels knowing the same to have been stolen from interstate commerce. The defendant was tried on the charge and at the end of all the testimony the defendant's motion to dismiss the indictment was granted under the holding in *U.S. v. Manuszak,* 234 F.2d 421 (3rd Cir. 1956). At the conclusion of the government's case, a motion for judgment of acquittal had been denied.

In *U.S. v. Manuszak, supra,* it was held that an indictment returned under 18 U.S.C. 659 must specify the place or facility from which the goods were taken, i.e., a station house, platform, wharf, etc. The indictment at No. 73-201 lacked the required specificity.

Both rulings were appealed. The government appealed the dismissal of the indictment and this ruling was affirmed. The defendant appealed the refusal to enter judgment of acquittal and this appeal was dismissed as premature. It was not yet appealable.

The government then returned a more specific indictment charging that defendant had received and possessed certain radios which had been stolen from the freight depot of Associated Transport, Inc. in Monroeville, Pennsylvania, knowing the radios to have been stolen.

(The first indictment had been similar except that it had omitted to name the location from which the theft had taken place).

In our view, double jeopardy had not occurred nor will it occur if and when another jury is sworn because the first indictment was a nullity and jeopardy in that indictment, therefore, never attached, see *U.S. v. Ball,* 163 U.S. 662 (1896) and *U.S. v. Beard,* 414 F.2d 1014 (3rd Cir. 1969).

The defendant argues, however, that we have heard all of the evidence once and it will do no good to repeat it because it was insufficient then and the motion for judgment of acquittal should have been granted the first time it was made and will, of necessity, be granted the second time around. The difficulty with the argument is that we do not know what the evidence will be at the second trial.

However, it seems to me that we should find some way to determine what additional facts, if any, will be introduced. A record is available of the first trial. If nothing more is to be produced, why not allow argument now on the question whether that evidence is sufficient

to go to a jury? If additional evidence is to be produced, why not find out what it will be? It is not likely that any of the witnesses can be influenced in this case. The saving of time and expense to the government and to the defendant should dictate that we try to avoid an argument after a second trial which would be no different than the argument we can hear now if the evidence the second time around will be precisely or substantially the same as that already heard.

Accordingly, the court will, pursuant to Rule 17.1, call a pretrial conference at which we will determine what, if any, additional testimony will be offered. If none will be offered, we will be in position to make a pretrial ruling on a renewed motion for judgment of acquittal, assuming the record can be adopted as an offer of proof. If additional testimony is to be offered, we will be in a better position to determine whether another trial is necessary.

The motion to dismiss the indictment is denied.

The court will hold a pretrial conference on January 15, 1975, at 4:00 P.M. in Court Room No. 10 for the purposes set forth above.

It is so ordered.

BARRON P. MCCUNE
United States District Judge

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1083

UNITED STATES OF AMERICA,
Appellee,

v.

DOMENIC N. DiSILVIO,
Appellant.

(D.C. Criminal No. 74-139)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 13, 1975
Before ADAMS, ROSENN and HUNTER, *Circuit Judges*

Richard L. Thornburgh
David M. Curry
Attorneys for Appellee
Thomas A. Livingston
Dennis J. Clark
Attorneys for Appellant

Appendix B.

Opinion of the Court

(Filed July 17, 1975)

HUNTER, *Circuit Judge*:

In this case, we must decide whether the double jeopardy clause bars the federal government from prosecuting appellant, Domenic DiSilvio, on a second indictment. The initial indictment was dismissed on defendant's motion after the jury had been impanelled and after evidence had been offered by the prosecution. We conclude that the double jeopardy clause does not bar a second trial. Accordingly, we affirm the district court's denial of appellant's motion to dismiss the second indictment.

I.

Appellant DiSilvio was indicted for receipt and possession of radios stolen from an interstate shipment in violation of 18 U.S.C. § 659. After presentation of the government's case in a jury trial in April of 1974, DiSilvio moved for judgment of acquittal. The motion was denied.[1] DiSilvio then moved for dismissal of the indictment which was defective in failing to state the facility from which the theft had occurred. The district court granted DiSilvio's motion to dismiss the indictment.[2] A more complete indictment charging DiSilvio

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1. DiSilvio appealed from the denial of his motion for acquittal. This court held that under 28 U.S.C. §1291, it was without jurisdiction to review such a non-final order.

2. Relying on this court's decision in United States v. Manuszak, 234 F.2d 421 (3d Cir., 1956), the district court dismissed the indictment. The government appealed from the dismissal of the first indictment and we affirmed.

with the same violation of 18 U.S.C. § 659 was subsequently issued. DiSilvio's pretrial motion to dismiss was denied and the instant appeal followed.[2a]

II.

DiSilvio argues that, although he moved for dismissal of the first indictment, we must grant the requested relief because the evidence offered by the government in the first trial was insufficient to support a guilty verdict. The first trial ended not because of any assessment of the evidence but because the district court ruled as a matter of law that the indictment was defective. We conclude that the evidence introduced at the trial on the original indictment was sufficient to make out a prima facie case under the statute. Therefore, we need not address DiSilvio's contention that the double jeopardy clause prohibits the government from trying a defend-

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2a. It is the general rule that a defendant may not appeal from a denial of a motion to dismiss since there has been no final order as required by 28 U.S.C. § 1291. In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), the Supreme Court carved out an exception to the final judgment rule where denial of an immediate appeal would effectively deny review. In *Cohen* the court reviewed a denial of defendant's request that plaintiffs file an expense bond in a shareholder's derivative suit as required by state law stating that "the rights conferred by the statute if it is applicable will have been lost probably irreparably," 337 U.S. at 546, unless immediate review is permitted.

With the Fourth Circuit, we deem this *Cohen* language especially appropriate in the double jeopardy context. United States v. Lansdown, 460 F.2d 164, 170, et seq. (4th Cir., 1972). In *Lansdown* the court stated:

> We believe that the district court's denial of a motion to dismiss based on a claim of double jeopardy is a final and appealable order under *Cohen*.

ant on a legally sufficient indictment when at a previous trial based on a defective indictment devoted to the same allegedly criminal act the prosecutor has rested his case without establishing all the elements of the offense. Our focus for purposes of this appeal is directed solely at the district court's dismissal of the indictment.

The Supreme Court has consistently held that the double jeopardy clause does not bar reprosecution of a defendant who succeeds in overturning his conviction on appeal. *North Carolina v. Pearce,* 395 U.S. 711 (1969);

First, defendant's right is under the fifth amendment and it is separable from and collateral to, the main cause of action, which is whether he is innocent or guilty of the crime charged. Second, the right claimed is a constitutional one and, as such, is too important to be denied review. Finally, if review is not had now, the right claimed—to be free from being twice forced to stand trial for the same crime—will be irreparably lost. 460 F.2d at 164.

This analysis is equally appropriate under Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), where the continuing validity of *Cohen* was indicated.

As such, we conclude that 28 U.S.C. § 1291 does not bar us from reviewing the denial of a motion to dismiss an indictment on double jeopardy grounds.

We note that in another context, state habeas corpus, we have recently held a state court's rejection of claims that a second trial is barred on double jeopardy grounds to be reviewable before the state defendant is subjected to a second trial. Although these cases dealt with exhaustion of state remedies rather than finality under § 1291, we stated that denial of immediate review would cause the habeas petitioner to forfeit the interests double jeopardy seeks to protect. *See*: United States ex rel. Webb v. Court of Common Pleas, No. 74-1980 (3d Cir., May 13, 1975); United States ex rel. Stewart v. Hewitt, No. 74-732 (3d Cir., June 10, 1975). That analysis is equally relevant in the finality context.

United States v. Ball, 163 U.S. 662 (1896).[3] *See: United States v. Beard*, 414 F.2d 1014, 1017 (3d Cir., 1969) (where we stated that reversal of a conviction obtained under a defective indictment did not bar retrial.) Similarly, the Supreme Court has stated: "Where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial errors." *United States v. Jorn*, 400 U.S. 470, 485 (1970); *United States v. Tateo*, 377 U.S. 463 (1964).[4] In this Circuit, the cases applying the double jeopardy provision have been consistent with the above statement by the Supreme Court. *United States v. Pappas*, 445 F.2d 1194, 1200 (3d Cir., 1971) *cert. denied sub nom; Mischlich v. United States*, 404

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3. Reversals or mistrials granted on the basis of insufficient evidence or any other assessment of the facts presented at trial do bar reprosecution. Fong Foo v. United States, 369 U.S. 141 (1962).

4. Where a mistrial is declared, not in response to a motion by defendant, but by the trial court *sua sponte*, the double jeopardy clause requires that a more stringent test be applied. A *sua sponte* mistrial is justified only when the "manifest necessity" test of United States v. Perez, 9 Wheat. (22 U.S.) 579, 580 (1824) has been satisfied. United States v. Jorn, 400 U.S. at 485. United States ex rel. Russo v. Superior Court, 483 F.2d 7, 12 (3d Cir.) *cert. denied* 414 U.S. 1023 (1973). It should be noted that even under this stringent "manifest necessity" test, a trial court's *sua sponte* declaration of a mistrial upon discovery of a defective indictment has been held not to bar reprosecution under the double jeopardy clause. Illinois v. Somerville, 410 U.S. 458, 469 (1972). If retrial was constitutionally proper on the facts of *Somerville* where the trial court declared a mistrial without defendant's consent, surely retrial is proper in the instant case where defendant's own motion initiated the declaration of a mistrial.

U.S. 534 (1971); *United States ex rel. Montgomery v. Brierley,* 414 F.2d 552, 558 (3d Cir., 1969) *cert. denied* 399 U.S. 912 (1970). *See also: United States v. Jamison,* 505 F.2d 407, 410 (D.C. Cir., 1974); *United States v. Romano,* 482 F.2d 1183, 1187 (5th Cir., 1973);[5] *United States v. Goldstein,* 479 F.2d 1061, 1066 (2d Cir., 1973); *Roberts v. United States,* 477 F.2d 544, 545 (8th Cir., 1973); *United States v. Franki,* 409 F.2d 958, 959 (7th Cir., 1969); *Raslich v. Bannan,* 273 F.2d 420 (6th Cir., 1959).[6]

In the instant case DiSilvio does not even allege that he was forced to seek a mistrial because of any intentional misconduct by the court or prosecution. At most, the United States Attorney was negligent in preparing

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5. Over a strong dissent, the Fifth Circuit has more recently barred retrial of a defendant who moved for a mistrial when the trial judge acted precipitously in banishing defense counsel. United States v. Dinitz, 492 F.2d 53 (5th Cir., 1974). The decision was affirmed by a divided court *en banc,* 504 F.2d 855 (5th Cir., 1974). The decision seems to go beyond the *Jorn* dicta that *severe* judicial overreaching which causes the defendant to move for mistrial must be shown before retrial will be barred. Even under the *Dinitz* court's expansive interpretation of the double jeopardy bar, DiSilvio could expect no relief. DiSilvio has failed to allege any abuse by the court or prosecution.

6. It has been suggested that a defendant who moves for a mistrial or who seeks a reversal of a criminal conviction has *waived* his double jeopardy objection. Green v. United States, 355 U.S. 184 at 189 (1957); United States v. Lansdown, 460 F.2d 164 at 171 n.8 (4th Cir., 1972). The Supreme Court recently noted in United States v. Wilson, 43 U.S.L.W. 4301 at 4305 n.11 (February 25, 1975) "that the practical justification of the exception is simply that it is fairer to both the defendant and the government."

a defective indictment. In *Jorn,* the Supreme Court suggested that negligent errors by the government which necessitate defendant's motion for a mistrial, are not sufficient to bar reprosecution. The court stated:

> The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial errors. 400 U.S. at 484.

The language makes clear that a defendant need not be set free on double jeopardy grounds were negligence on the part of the government requires the court to grant defendant's motion for a mistrial.

Absent a showing of more than mere negligent error by the United States Attorney in the preparation of the first indictment, DiSilvio's argument in this case is without merit.[7]

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7. We note that the Supreme Court's recent double jeopardy cases are not helpful to DiSilvio. In United States v. Wilson, 43 U.S.L.W. 4301 (Feb. 25, 1975), retrial was not required since the district court had ruled in post guilty verdict motion that pre-indictment delay required dismissal of the indictment. Appeal was allowed since a decision in the government's favor would not require retrial. The jury verdict rendered at the first trial could merely be reinstated.

In United States v. Jenkins, 43 U.S.L.W. 4309 (Feb. 25, 1975), the district court as trier of fact dismissed the indictment after presentation of the government's case. The Supreme Court agreed that appeal and reprosecution were barred since the dismissal, based as it was on facts adduced at trial, was tantamount to a

III.

For the foregoing reasons, the district court's denial of the motion to dismiss the indictment will be affirmed.

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judgment of acquittal. Reprosecution would require a second "resolution of factual issues going to the elements of the offense charged . . . ." 43 U.S.L.W. at 4312.

In United States v. Serfass, 43 U.S.L.W. 4315 (March 3, 1975), the indictment was dismissed in pretrial proceedings before jeopardy had even attached. Government appeal was clearly proper in *Serfass*.

None of these cases addresses the effect of a *legal* ruling, made on *defendant's* motion, after jeopardy has attached, thus leaving *Jorn* as the last case to discuss, albeit in *dicta*, the issue raised by DiSilvio.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1083

UNITED STATES OF AMERICA,

Appellee,

v.

DOMENIC N. DiSILVIO,

Appellant.

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by
Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JAMES HUNTER, III
James Hunter, III, Judge

Dated: August 6, 1975

APPENDIX D

Certificate of Service

Petitioner, Dominic N. DiSilvio, by his attorneys, Thomas A. Livingston, Esq., and Dennis J. Clark, Esq., hereby certify that the within Petition for Writ of Certiorari has been forwarded by mail for filing to the Clerk of the Supreme Court of the United States in Washington, D.C., and that a true and correct copy of said Petition has been served by mail upon the Office of the Solicitor General of the United States, Department of Justice, Washington, D.C.

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DENNIS J. CLARK, ESQ.